No. 3109

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

3

PACIFIC MAIL STEAMSHIP COMPANY (a corporation),
Plaintiff in Error,
vs.
THE WESTERN PACIFIC RAILROAD COMPANY (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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Statement of the Case.

The statement of the case contained in the brief for plaintiff in error requires little by way of amendment or qualification. The nature of the action, the amount sought to be recovered, the rulings of the District Court upon the demurrers interposed to the original, first amended and second amended answers, and the order for the entry of judgment upon the pleadings are alike properly set forth. However, a correction must be made in that portion

of the statement purporting to set forth the averments of the seconded amended answer respecting the rules of the Board of State Harbor Commissioners as to the payment of State Tolls. This portion of the statement reads as follows:

> "and that under the rules of the Board of State Harbor Commissioners of the port of San Francisco plaintiff was required to *initially* pay the charges assessed for State toll;" (Brief for Plaintiff in Error, page 3.)

We have italicized the word "initially" in this excerpt because it is not found in the text of the answer. The literal phrasing of the clause in the answer is as follows:

> "that under the rules of the Board of State Harbor Commissioners for the port of San Francisco, the tolls for said cargo received on board from plaintiff and delivered on said piers 42 and 44, from the vessels of defendant for the plaintiff and for said Receivers, were required to be paid by the vessels of defendant receiving and/or discharging such cargo," (Tr. p. 35.)

The interpolation of the word "initially" in the statement of the case prepared by the plaintiff in error may conceivably mislead, and for that reason attention is directed to the error. It was and is the contention of the defendant in error that the obligation to pay the tolls assessed against the vessels of the plaintiff in error rests with the plaintiff in er-

ror, not *initially* merely but *finally*. In virtue of this contention there should be no misapprehension as to the state of the record.

With the exception above noted, the statement of the case offered by the plaintiff in error does not require controversion.

ARGUMENT

The Issues.

The issues presented by the writ of error herein are narrow and free from complication. The assignment of errors presents, in varying form, the exception of the plaintiff in error to the ruling of the District Court that the second amended answer fails to state facts sufficient to constitute a counterclaim. The primary issue, therefore, is the validity of the alleged counterclaim. The propriety of the award of interest is a subsidiary issue, determinable by the ruling upon the major issue.

Preliminary Legal Principles.

We are in essential accord with counsel for plaintiff in error respecting certain preliminary legal principles. That the defendant in error, as a carrier subject to the Act to Regulate Commerce, must file its tariffs with the Interstate Commerce Commission; that the provisions of its terminal and other

tariffs, filed pursuant to the requirements of the Act, have the force of law and must be strictly observed; and that the Interstate Commerce Commission has no jurisdiction over the ocean carriage of export and import traffic destined to or coming from non-adjacent foreign countries, are elemental. But we are sharply in opposition respecting the results flowing from these principles. We submit with confidence that their recognition and application in this case can lead to but one conclusion, and that unfavorable to the contentions of the plaintiff in error.

The Tariffs of a Rail Carrier Providing That It "Will Absorb State Toll" on Export and Import Traffic Relate to That Toll Which Accrues in Connection with the Rail Haul and Do Not Comprehend the Toll Which Accrues in Connection with the Service of a Connecting Ocean Carrier.

This conclusion is necessitated by the limits of jurisdiction fixed by the Act to Regulate Commerce, which find clear recognition in the brief of plaintiff in error. The text of Section VI of the Act to Regulate Commerce, which embodies the requirement of tariff publication, may profitably be consulted in this behalf. The first paragraph of the section reads as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all

the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. *The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.*"

We have italicized the final sentence of the paragraph because it states in terms of the clearest character that the tariffs which must be published and

filed relate only to the "traffic, transportation, and facilities defined in this Act." This necessarily excludes the traffic, transportation, and facilities of ocean carriers engaged in transportation to non-adjacent foreign countries, because concededly they are not defined or included in the Act. The jurisdiction of the Interstate Commerce Commission, as defined in the Act, extends only to the interior haul to and from the seaboard. In *Cosmopolitan Shipping Company* vs. *Hamburg-American Packet Company,* 13 I. C. C. 266, the Interstate Commerce Commission held that the rail carriers must publish as separately established rates the inland proportions of the rates applicable to traffic destined to or coming from points in non-adjacent foreign countries. This conclusion was forced by the absence of authority over the water carriers. The Commission says upon this point:

> "The Commission, not having been given control over the ocean carriers, cannot compel observance of the law by such carriers, and if they so choose they may alter their rates at such times as they please or for such patrons as they please. *Therefore the line must be drawn decisively between those carriers whose rates and practices this Commission can control and those which it cannot control;* and upon this line of reasoning it has been the consistent ruling of the Commission that 'joint rates' cannot be made between carriers subject to the act and those not subject to the act.

> The Federal Government has said that this Commission shall exercise jurisdiction over the inland portion of the haul, either to or from the foreign country; and it must logically and necessarily follow that the rate which must be filed with the Commission under Section 6 of the act is the rate governing such movement."

Again, in *Chamber of Commerce of New York* vs. *New York Central and Hudson River Railroad Company,* 24 I. C. C. 55, 74, the Commission said:

> "We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic on the ocean and thus differentiate it, reasonably, from domestic traffic, but the rates to and from the ports must be reasonable, *must be published as independent from the ocean transportation,* and are subject to all of the provisions of the act."

See also *Aransas Pass Channel & Dock Company* vs. *G. H. & S. A. Ry. Co., et al.,* 27 I. C. C. 403, 414; *Louisiana Sugar Planters' Association* vs. *Illinois Central Railroad Company, et al.,* 31 I. C. C. 311, 319.

These limitations upon the jurisdiction of the Commission, we have stated, are conceded by counsel for the plaintiff in error, but they fail to find recognition in his argument. If it be true, as the Commission says in the Cosmopolitan Shipping

Company case, *supra,* that "the line must be drawn decisively between those carriers whose rates and practices this Commission can control and those which it cannot control," it follows that the tariff of the rail carrier can not be construed to cover any charge or service of a connecting ocean carrier. If it be true, as the Commission says in the Chamber of Commerce case, *supra,* that the rail rates to and from the ports "must be published as independent from the ocean transportation," *it follows that the tariffs of the rail carrier, published as independent from the ocean transportation, comprehend nothing within the field of ocean transportation.* If the tariff of the rail carrier were so construed as to comprehend any feature of the ocean service, it could not be said that the line had been drawn decisively, or that rates had been published as independent from the ocean transportation, as the Act and the rulings of the Commission alike require.

We reproduce from the brief for plaintiff in error a portion of Rule 71 of the Interstate Commerce Commission's Tariff Circular 18-A, italicizing, for the sake of emphasis, a clause of Subdivision (b):

> "Ocean carriers between ports of the United States and foreign countries not adjacent are not subject to the terms of the Act to regulate commerce; nor to the jurisdiction of the Commission.

(a). The inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares *to the ports and from the ports,* and such rates or fares must be the same for all, regardless of what ocean carrier may be designated by the shipper or passenger.

(b). As a matter of convenience to the public said carriers may publish in their tariffs such through export or import rates or fares to or from foreign points as they may make in connection with ocean carriers. *Such tariffs must, however, distinctly state the inland rate or fare as above provided;* and need not be concurred in by the ocean carrier, because concurrence can be required from, and is effective against, only carriers subject to the Act."

Subdivision (d) of the same paragraph is likewise pertinent. The text is as follows:

"(d). Export and import traffic may be forwarded under through billing, but such through billing must clearly separate the liability of the inland carrier or carriers and of the ocean carrier, and must show the tariff rate of the inland carrier or carriers."

Again we submit that if the tariffs of the rail carrier must *distinctly state the inland rate or fare* —if the bill of lading *must clearly separate the liability of the inland carrier or carriers and of the ocean carrier*—then it follows that the tariff of the rail carrier relates to its own field of service, and can not be held to reach beyond into the field of service

of the ocean carrier in nowise amenable to the Act. In fine, the service, the liability and the tariffs of the rail carrier reach their limit at the point of interchange with the water carrier—in shipping parlance, at ship's tackle. They do not comprehend any portion of the service, the liability or the obligations of the water carrier.

For the sake of concreteness an illustrative case may be presented. A shipment is carried by rail from Chicago to San Francisco destined for ocean movement to an Oriental point. Upon arrival at Oakland it may be transferred by means of the rail carrier's barge to San Francisco, the entry being made over a state wharf. A State Toll is assessed for this privilege and paid by the carrier. The shipment is then delivered to a connecting rail carrier to be switched to the wharf at which the steamer is berthed. A switching charge accrues for this service. The shipment is then placed upon the wharf—at ship's tackle. Delivery to the ocean carrier is now complete. The shipment is then taken on board by the ocean carrier. A toll accrues against the vessel for its use of the wharf and is paid by the ocean carrier.

The nature and office of the rail carrier's terminal tariff may now be considered. Its purpose is to apprise the shipper and receiver of freight of all services, charges and privileges of a local character, not

normally to be found in the tariffs carrying the main line rates. Accordingly, the defendant in error herein provides in its terminal tariffs that it will absorb the switching charges of connecting rail carriers, and also that it will absorb State Toll (Tr. pages 33-34). In brief, the shipper is informed that the main line rate is a net rate, carrying the shipment without additional charge to the point of delivery to the connecting ocean carrier. Both of the charges which the rail carrier assumes to this end accrue within its own field of service.

On page 17 of the brief for plaintiff in error is found a purported quotation from the terminal tariffs of defendant in error, with indicated omissions. But this purported quotation is the product of a complete transposition of the language of the tariff, with the result that a wholly misleading impression is created. The text is not susceptible of this inversion. By reference to the text of the items, it will appear that the carrier agrees, first, to absorb the switching charge of the connecting rail carrier, and, second, to absorb State Toll. The switching charge which it assumes is that which accrues within its fields of operation—for the delivery service of the connecting rail line which it makes its own. The State Toll stands in similar case. Both are incident to the rail haul; both are within the Act to Regulate Commerce. The characterization

of traffic embodied in the item is a characterization merely. The item does not state, directly or by implication, that the State Toll assessed against the vessel of the water carrier after the completion of the rail carrier's service—beyond the limits of the Act to Regulate Commerce—will be assumed.

We take from Page 22 of the brief for plaintiff in error a tabulation of charges which, it is stated, the shippers would have been informed that they were obligated to pay had the absorptions not be published:

> "1st. The main line rate;
>
> 2nd. The switching charge;
>
> 3rd. The State Belt toll; and
>
> 4th. The rate of the ocean carrier."

An important item has been omitted. We venture to amend to read as follows:

1st. The main line rate;

2nd. The switching charge;

3rd. The State Toll assessed against the rail carrier;

4th. The State Toll assessed against the ocean carrier; and

5th. The rate of the ocean carrier.

The flaw in the tabulation prepared by plaintiff in error is represented by the failure to include the two tolls—one accruing as an incident to the rail service and the other as an incident to the water service.

At the risk of prolixity, we repeat that the effect of the terminal tariff is to inform the shipper that the main line rate is a net rate so far as the service of the rail carrier is concerned. It includes the State Toll accruing in the course of rail service; it includes the switching charge of the connecting rail carrier, and, therefore, carries the freight to the point of delivery upon the wharf at ship's tackle. But, it can not be warped into an undertaking to go beyond ship's tackle into the service of the ocean carrier and absorb a *second State Toll* which accrues against the vessel itself for its use of the State wharf. Herein lies the error in the contentions of the plaintiff in error.

The analogy which the plaintiff in error seeks to draw between the tolls here in controversy and drayage charges is singularly imperfect. Conference Ruling No. 441 of the Interstate Commerce Commission, reproduced upon pages 23 and 24 of brief for plaintiff in error, relates to "a transfer or drayage

charge in connection with a through shipment," *i. e.,* a charge for a transfer service which the carrier makes its own, as, for example, between the stations of connecting rail carriers. But the rail carrier could not make its own the service of an ocean carrier engaged in transportation to a non-adjacent foreign country. It could not absorb the trans-oceanic charge of the ocean carrier, because beyond the scope of the Act. For the same reason it could not assume any other charge of the ocean carrier, even though it be local in character, because beyond the scope of the Act.

We again submit that the defendant in error has not, in fact, assumed the burden of these ocean tolls, because the tariff excludes the service and obligations of the ocean carrier and relates only to the service and obligations which are within the Act.

A Carrier's Tariff Does Not Govern Its Relations with Connecting Carriers; It Applies Solely to the Relations Between the Carrier and Its Patrons.

The purpose of the Act in requiring the publication of tariffs by carriers subject to its provisions was to enable shippers to inform themselves with respect to the rates which they must pay and the service which the carrier must afford. (*United States* vs. *Chicago & Alton Railway Company,* 148 Fed. 646; *Chicago & Alton Railway Company* vs.

United States, 156 Fed. 558; *Newton Gum Company* vs. *Chicago, Burlington & Quincy Railroad Company,* 16 I. C. C. 341.)

The carrier's tariffs speak to the shipper and not to a connecting carrier. Relations between connecting carriers are not normally embodied in tariffs; on the contrary relations between carriers *inter se* are set forth in traffic contracts and division sheets. As the Commission well said in *Cosmopolitan Shipping Company* vs. *Hamburg-American Packet Company, supra*:

> "But as to such carriers (*i. e.* ocean carriers) engaged in foreign business, the rail carrier has, so far as this law is concerned, a purely contractual or proprietary relation, *not a relation regulated or controlled in any manner by this act.*

The provisions of the tariffs of rail carriers reciting that State Tolls at San Francisco will be absorbed were designed to inform shippers that the rail carriers would assume the toll exacted by the State for the movement of freight over state wharves in connection with the rail haul, thereby relieving the shippers of that burden. The tariffs were obviously not designed to advise the ocean carriers that they would be reimbursed by the rail carriers in the amount of tolls paid by the water carriers to the State in connection with the water service. The rail carrier has no part or interest in the service or obli-

gations of the water carrier. There could be no possible motive on the rail carriers' part to relieve the water carriers of a burden resting upon them. Accordingly, this defendant may not competently invoke the tariff rule for the purpose of imposing upon the rail carrier a double burden of State Tolls comprehending the tolls assessed in connection with the rail and water service alike.

We are under the necessity of pointing out that counsel for the plaintiff in error has misconceived our contention in the District Court. We have not intimated that the question is one in which neither the Commission nor shippers have an interest; we have not suggested that a carrier subject to the Act may disregard its tariffs. We have contended only, as we contend now, that the tariff speaks to the shipper—not to a connecting water carrier. The rail carrier makes no agreement with a connecting ocean carrier by virtue of its terminal tariff; such agreement as it makes is with consignors and consignees—it is for them that the tariff is published—it is to them that the tariff speaks, and it speaks to them only respecting matters comprehended within the rail carrier's field of service—a field of service marked by bounds clearly set by the Act to Regulate Commerce. We insist, therefore, that the ocean carrier, which is the plaintiff in error in this case, may not competently invoke the terminal tariffs of the rail carrier, which is the defendant in error here-

in, for the purpose of shifting to the rail carrier a burden which rightfully rests upon the ocean carrier itself.

Defendant in Error Did Not Agree to Absorb the State Tolls Assessed Against the Vessels of the Plaintiff in Error Respecting the Shipments in Question.

The alleged "agreement" is sought to be found in the terminal tariffs of defendant in error, but we think it is clear from the foregoing argument that defendant in error did not, by virtue of its published tariffs or otherwise, agree to assume the State Tolls assessed against the vessels of the plaintiff in error. It is significant that there is no averment of an *agreement* in the Second Amended Answer. The fluctuations in the text of the pleadings of the plaintiff in error are not without significance. The original answer alleges no agreement (Tr. pages 8-16). By its First Amended Answer, plaintiff in error sought to set up an agreement "on information and belief" (Tr. pages 22-24). The demurrer interposed by the defendant in error to this pleading was confessed by the plaintiff in error in open Court (Tr. page 29). The Second Amended Answer is discreetly silent as to any alleged contractual undertaking. (Tr. p. 29-39.) The averment in Paragraph VII of the separate answer embodied in the second amended answer (Tr. p. 39) that the tolls paid were those contemplated by the terminal tariffs of the defendant in error, is a mere conclusion of

law, and is expressly negatived by the averment in Paragraph III of the same answer which sets forth that the tolls paid "were required to be paid by the vessels of defendant (plaintiff in error) receiving and/or discharging such cargo." (Tr. page 35.) Accordingly, the contention that the defendant in error had agreed to assume the tolls here in controversy is not only without support of record, but is overthrown by the answer itself.

The State Tolls Paid by the Plaintiff in Error Were Not Paid for or on Behalf of Defendant in Error.

The averment to the contrary effect again represents a mere conclusion, founded upon the same attempted projection of the rail carrier's tariffs into the field of ocean transportation. It is not even alleged that payment was made upon the request or at the instance of the defendant in error. (27 Cyc. 843.) We repeat that the contention is negatived by the averment in Paragraph III of the Second Amended Answer, which clearly shows that the tolls paid were those assessed against the vessels, and not those which accrued in the course of rail service. (Tr. page 35.)

The attempt to rely upon custom is singularly strained. The custom so haltingly averred relates to the circumstances of the alleged payment for and in behalf of the defendant in error, and fails with the

failure of the remainder of the averment. We may observe, however, that resort may be had to custom to explain a written contract only when ambiguity exists. This is axiomatic and is supported by the authorities cited in the brief for plaintiff in error. No written contract is alleged, and no ambiguity appears elsewhere, since the limitations of the tariff published by a rail carrier subject to the Act are clearly fixed by law. Resort to alleged custom, therefore, can not assist the case of plaintiff in error.

Interest Was Properly Allowed.

It is well settled that a tender of the payment of a part of an indebtedness will not suffice to stop the running of interest upon the entire sum or any portion thereof.

22 Cyc. 1557;

Lilienthal vs. *McCormick* (9th C. C. A.), 117 Fed. 89;

Donaldson vs. *Severn River Glass Co.,* 138 Fed. 691.

Since the tender pleaded was but partial, the District Court properly allowed interest upon the principal sum recovered.

It is respectfully submitted, therefore,

1st. That the provisions of the Act to Regulate Commerce and the tariffs published by rail carriers

responsive to its requirements do not cover any portion of the service of a connecting ocean carrier, engaged in transportation to points in non-adjacent foreign countries.

2nd. That the tariffs of a rail carrier providing that it will absorb State Toll on export and import traffic relate to that toll which accrues in connection with the rail haul and do not comprehend the toll which accrues in connection with the service of a connecting ocean carrier.

3rd. That a carrier's tariff does not govern its relations with connecting carriers, but applies solely to the relations between the carrier and its patrons.

4th. That defendant in error did not agree to absorb the State Tolls assessed against the vessels of the plaintiff in error respecting the shipments in question.

5th. That the State Tolls paid by the plaintiff in error were not paid for or on behalf of defendant in error.

6th. That interest was properly allowed.

It is submitted that the order of the District Court should be affirmed.

Respectfully submitted,

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